No. 13690.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ELWOOD C. MARTIN, FRED R. NEMEC, and ROBERT W. NEMEC, a Co-partnership d/b/a NEMEC COMBUSTION ENGINEERS,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

Jurisdiction.

Respondent concedes that if the Board had jurisdiction, this Court has jurisdiction. Respondent asserts that the Board was without jurisdiction because the Complaint was issued more than six month after the alleged unfair labor practices allegedly occurred. Therefore the Complaint could not issue under Section 10(b) of the Act. (29 U. S. C., Sec. 160.)

The Complaint is at variance with the Charges and attempts to introduce new Charges which were not contained in the original Charges and which are barred by

limitations, and hence the Complaint and could not issue under the Act as amended, thus depriving the National Labor Relations Board and this Court of jurisdiction.

Section 10(b) of the Act provides in part as follows:

> "*Whenever it is charged* that any person has engaged in, or is engaging in, any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a *complaint stating the charges in that respect.* * * *
>
> "* * * that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *." (Emphasis added.)

The Charge states in part as follows [R. 2]:

> "That the Employer discharged employees Thomas Frederick and Clarence Leeper on or about December 28, 1950, upon the *grounds* that these employees *were engaging in union organizational activities* for the purpose of discouraging the formation of the Union." (Emphasis added.)

Paragraph 5 of the Complaint [R. 5-6] alleges:

> "Respondent did discharge Thomas Frederick on or about December 27, 1950, and did discharge Clarence Leeper on or about December 28, 1950, and at all times since said dates has refused and failed and does now refuse and fail to reemploy them for the *reason* that they *engaged in concerted activities* with other employees for the purposes of collective bargaining and other mutual aid and protection." (Emphasis added.)

The Charges allege that the discharge was because they engaged in *"union organizational activities."*

The Charge was filed February 1, 1951 [R. 1], which was within six months of the time of the occurrence of the unfair labor practice therein alleged.

The Complaint was filed November 14, 1951 [R. 11], which was more than six months after the occurrence of the unfair labor practice alleged therein, to wit, the discharge of Frederick and Leeper on or about December 28, 1950, on the ground of "concerted activities."

The Charge could not have been amended November 14, 1951, to allege that the discharge of the two employees was on account of "concerted activities." It would have been barred by the six months' limitations of the Act. (*Joanna Cotton Mills Co. v. N. L. R. B.,* 176 F. 2d 749, Appendix pp. 1-3.)

You cannot do indirectly what cannot be done directly. If the Charge could not have been so amended, then the Complaint cannot contain a new charge unless the additional or new unfair labor practice alleged was committed not less than six months prior to the filing of the Complaint.

There is a difference between discharging an employee on account of "union organizational activities" and "activities in behalf of a union" and discharging an employee because he has engaged in "concerted activities."

The Charges were filed by the International Union, United Automobile Workers of America, A. F. L. [R. 2-3]. The Complaint [R. 4] states "it having been charged by International Union, United Automobile Workers of America, A. F. L., hereinafter called the

Union, that * * * hereinafter called the Respondent, has been engaged in and is engaging in unfair labor practices."

The Complaint then states [R. 5] that the Union is a labor organization within the meaning of the Act, and then alleges [Par. 5] as above set forth. As stated above, the allegations in Paragraph 5 are not based on the ground of Union activity. The Complaint then [R. 6], in Paragraph 6, alleges an unfair labor practice because of Union activities. As hereinafter set forth, the Trial Examiner dismissed Paragraph 6 of the Complaint, thus striking out all allegations with respect to Union activities upon which the Charges were founded as alleged by the Union and as set forth in the Complaint.

Section 7 of the Act, in defining the rights of employees, states that employees shall have the right (1) to self-organization, (2) to form, join, or assist labor organizations, (3) to bargain collectively through representatives of their own choosing, and (4) to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. There is a distinct difference between each of these rights, and the Act so recognizes the same.

The Charge in this case states that Frederick and Leeper were discharged on the grounds that they were engaging in Union organizational activities for the purpose of discouraging the formation of the Union. The Union in this case had already been formed and hence the only alleged ground of discharge could be that these employees were engaged in Union activities, which is at variance with the allegations of the Complaint.

The case of *Joanna Cotton Mills Co., (supra)*, originated on a charge filed with the Board by an A. F. L. Union in 1947 alleging that the company had engaged in various anti-union activities and had discharged Blakely, an employee, because of his membership in and activities on behalf of the Union. An amended charge was filed February 13, 1948, adding to the original charge an allegation that the company had discharged Blakely because he had engaged with other employees "in concerted activities for the purpose of collective bargaining and for other mutual aid and protection," and a copy of this amended charge was not mailed to the company until February 26, 1948, more than six months after the Act had become effective. The Board tried to say that the charge served more than six months after the effective date of the Act was an amended charge and that the original charge was filed and served in time. In holding that the charge was barred by the limitations of Section 10(b) of the Act, the Court held (p. 754):

> ". . . *The trouble, however, is that no charge relating to discharge for engaging in concerted activities, as distinguished from Union activities, was served upon the company until more than six months had elapsed after the Act had become effective.*
>
> ". . . *The amended charge,* which was expressly filed as a substitute, *alleged for the first time that the discharge was because* Blakely had engaged in *'concerted activities' other than in connection with* his *union membership,* and *thus brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge.*

> "The Board argues that it was the discharge of Blakely that was charged as an unfair labor practice in both charges, *but the mere discharge of an employee is not an unfair labor practice* . . . The case seems clearly one for the application of the rule recently announced by the Supreme Court that 'a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.' (Citing cases.)" (Emphasis added.)

This Court, in the case of *N. L. R. B. v. Globe Wireless,* 193 F. 2d 748, held as follows:

> "The charge filed with the Board alleged violations of §8(a)(1) and (3) only by the making of the discharges. There was no averment of the independent coercive violations just now discussed, the latter being later incorporated in the Board's complaint. The respondent claims that a complaint issued under the Act as amended is limited in scope by the averments contained in the charge filed to initiate the proceeding. We see no basis for this view. The Board would not appear to be debarred by the amended Act from enlarging upon a charge *unless the additional unfair labor practices alleged were committed more than six months prior to the enlargement.* The inclusion here of the charge of coercion was made within six months of the allegedly coercive conduct."

The holding of this Court in the *Globe Wireless* case is not contrary to the holding of the court in the case of *Joanna Cotton Mills,* as the appellant Board would tend

to lead one to believe (Board Br. p. 27). The court in the *Joanna Cotton Mills* case properly held that discharging an employee because of union activities is an entirely different charge from one alleging that an employee was discharged because he engaged in "concerted activities." Hence, a charge based upon concerted activities is an additional unfair labor practice if the original charge was based upon union activities.

This court, in the *Globe Wireless* case, (*supra*), stated that the Board would not appear to be debarred by the amended Act from enlarging upon a charge unless the additional unfair labor practices alleged were committed more than six months prior to the enlargement.

As stated above, the original Charge alleged that the discharge of the employees was because they engaged in union activities, which discharge was on December 28, 1950. The Complaint alleges that the discharge was because the employees engaged in concerted activities, and the Complaint was filed November 14, 1951. Hence, the new unfair labor practices alleged in the Complaint were allegedly committed more than six months prior to the issuance of the Complaint.

In the *Globe Wireless* case (*supra*), there was an additional unfair labor practice alleged (which was committed within six months of the issuance of the Complaint), while in the instant case there is an entirely different unfair labor practice alleged in the Complaint than in the Charge, and which was allegedly committed more than six months prior to the issuance of the Complaint.

Since the Complaint setting forth the entirely new unfair labor practice was filed more than six months after the alleged unfair labor practices were committed, it is

submitted that under the authority of the *Globe Wireless* case, decided by this court, the Board was deprived of jurisdiction and barred by the six-months' limitation of the Act.

Also in accord with the foregoing is the case of *Superior Engraving Co. v. N. L. R. B.,* 183 F. 2d 783 (C. A. 7), where the court stated, at page 790:

> "Consequently we conclude that the decisions relied on by the Board are in error and that petitioner is correct in contending that, of the unfair practices with which petitioner is charged in the union's second amended charge, those which occurred more than six months prior to the filing of the charge were wrongfully embodied in the complaint."

The Board attempts to argue (Board's Br. p. 22), that the only difference between the Complaint and the Charge is that the detailed averment in the Complaint is broad enough to describe not only a discharge for "union" activity but also a discharge for "concerted activity" not undertaken in behalf of a union, whereas the Charge refers specifically to "union" activity alone. The Board is wrong in its analysis of the Complaint. The Complaint [R. 5] plainly states that the Respondent discharged Thomas Frederick and Clarence Leeper for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection. The Complaint in no place mentions that the discharge was on the grounds that the employees engaged in union activities as set forth as the basis of the Charge [R. 2].

Hence the Complaint did not enlarge the original Charge and did not merely allege in more particularity the acts

constituting an unfair labor practice and did not constitute "at most a slight change in legal theory." The Complaint substituted and brought into the case a new and entirely different charge of unfair labor practice from that contained in the original Charge (*Joanna Cotton Mills, supra*), and therefore the Court is debarred by the amended Act because the additional unfair labor practices alleged in the Complaint were committed more than six months prior to the enlargement. (*Globe Wireless, supra.*)

The Board in its brief (p. 25), states that a majority of the circuit courts hold that a complaint under the amended Act may properly deviate from the charge provided only that the violations included in the complaint did not occur prior to the six months' period of limitation fixed by the filing and service of the charge. Respondent submit that this is not the law. We have found no cases that hold that a new and entirely different charge can be brought, whether by way of complaint or by way of an amended charge, unless the occurrence of the unfair labor practice was within six months of the date of the filing of the charge, the amended charge, or the complaint.

In *N. L. R. B. v. Westex Boot & Shoe Co.,* 190 F. 2d 12 (C. A. 5), the court stated: "A charge is a condition precedent to the Board's power to issue a complaint." While Respondent feels this is a correct statement of the law, yet, assuming that a complaint can issue even though no charge was filed, it certainly cannot be argued under the Act as amended that in such case a complaint can be issued more than six months after the occurrence of the unfair labor practice. The Board in its brief (p. 27), stated that the *Westex* case, *supra,* was exactly like

the Complaint in this case. We do not so interpret the *Westex* case. In the *Westex* case, the court stated:

> "It seems to us that in this case, the complaint merely 'elaborated the charge with particularity' (citing cases) and that the respondent's contention that the Board lacked jurisdiction because the complaint included alleged unfair labor practices not stated in the charge is not well founded."

In the instant case, as stated above, the Complaint was not based upon the Charges and contained entirely new and different Charges.

The Board in its brief (p. 27), cites the case of *Katz v. N. L. R. B.*, 196 F. 2d 411 (C. A. 9), in support of its contentions. In this case this Court merely held that the Charge was sufficient to support the allegations of the Complaint and that the Complaint was not too general.

The Board in its brief (pp. 25-27), cites various cases which Respondent has discussed and distinguished in the appendix, pages 4-8.

The six months' period of limitation contained in Section 10(b) of the Act is not merely a statute of limitations but is a statute depriving the Board of jurisdiction over the barred charges.

Section 10(a) of the Act (29 U. S. C. A., Sec. 160(a)), provides that "The Board *is empowered, as hereinafter provided,* to prevent any person from engaging in any unfair labor practice (listed in Sec. 158 of this Title) affecting commerce." This provision is obviously one granting power and jurisdiction to act only within the time provided in the Act for the power is restricted "as

hereinafter provided." Subsection (b) of Section 10 provides in part *"that no complaint shall issue* based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." This provision is not merely a statute of limitations but it goes to the very jurisdiction of the Board and deprives it of power and jurisdiction to issue a complaint after the expiration of the six months' period. Since the charges of unfair labor practice which are contained, and for the first time alleged, in Paragraph 5 of the Complaint, were issued more than six months after they allegedly occurred, both the Board and the Examiner were without power to entertain them and were without jurisdiction to make any findings based thereon.

There is a marked and wide distinction between a pure statute of limitations and a special statutory limitation which qualifies or confers a given right only where the right is exercised within the time provided in the statute. In the case where the right to proceed is given by a statute containing a condition precedent that it must be exercised within a given period, the exercise of the right within that period is essential to the existence of the cause of action. If the right is not exercised within the statutory period, it is wholly extinguished.

Thus, in the case of *O'Neill v. Cunard White Star Limited,* 69 Fed. Supp. 943, the court considered a provision of the Jones Act which incorporated by reference a section of the Employers Liability Act which read, *"No action shall be maintained* under this Chapter unless commenced within three years from the day the cause of action accrued." The court, in holding that this provision

was one limiting the right created by the statute, said at page 945:

> "The quoted provision of §56 'is one of substantive right, setting a limit to the existence of the obligation which the Act creates.' It is a limitation on the right created by statute. Engel v. Davenport, 1926, 271 U. S. 33, 38, 46 S. Ct. 410, 412, 70 L. Ed. 813."

The language of Section 10(b) of the National Labor Relations Act is very similar to that contained in the Jones Act.

Wilson v. Missouri Pacific R. Co., 58 Fed. Supp. 844, involved an Arkansas statute granting a cause of action for wrongful death. It provided that "every such action shall be commenced within two years after the death of such person." The court held that this statute prescribed, as a condition precedent to the right granted, that the action be begun within two years after death and that if not instituted within that time, not only could the action not be maintained at all but that the defendant could not waive nor be estopped from raising the question, and numerous authorities are cited sustaining the holding of the court.

Under these and other authorities therefor, it is manifest that the failure to issue the Complaint within six months after the occurrence of the alleged unfair labor practices deprived the Board and the Trial Examiner of jurisdiction.

It is somewhat difficult to determine from the Trial Examiner's Intermediate Report and the Conclusions of

Law therein whether or not he held that Respondent was guilty of discharging Frederick and Leeper because they were engaged in union activities with respect to the Union. If the Trial Examiner so found, it was not within the issues and facts stated in the Complaint and he and the Board were without jurisdiction. [See Compl., Par. 5; R. 5.]

If the Trial Examiner found that Respondent was guilty of discharging said two employees because they engaged in concerted activities for the purpose of collective bargaining and for other mutual aid and protection, then the Complaint is at variance with the Charges, and contains new Charges which are barred by the six months' limitation of the Act, and over which neither the Board nor the Trial Examiner has jurisdiction.

If the new Charges added by the Complaint are stricken therefrom, then the only thing that Paragraph 5 thereof would allege is that Respondent discharged Frederick and Leeper. The mere discharge of an employee is not an unfair labor practice. (*Joanna Cotton Mills, supra.*)

In view of the fact that the Trial Examiner, as hereinafter set forth, dismissed Paragraph 6 of the Complaint on Respondent's motion [R. 12], the Board, by reason of the foregoing, with respect to the allegations in Paragraph 5 of the Complaint should have dismissed the whole of the Complaint. Without the allegations of Paragraphs 5 and 6 of the Complaint, the Complaint would not allege sufficient facts to show a violation of the Act by Respon-

dent. Also, since the Trial Examiner dismissed Paragraph 6 of the Complaint, and since Paragraph 5 added new Charges, which cannot be done because of the six months' period of limitation as aforesaid, there is nothing left in the Complaint or in this case.

Respondent raised the above jurisdictional question with the Board.

For the foregoing reasons alone, the Court should set the order of the Board aside, dismiss the Complaint, and refuse to grant an order to enforce the Board's order, and the Court need not consider the other questions in the case.

However, Respondent will nevertheless point out other reasons why the Complaint should be dismissed, even assuming there was no new Charge set forth in the Complaint and assuming that the Complaint alleged that both Frederick and Leeper were discharged because they engaged in union activities with respect to the Union.

Statement of the Case.

Respondent controverts the statement of the case as presented by the Board.

The Board in its brief (p. 2) states that Thomas Frederick was the Union's chief promoter in the plant and that (p. 3) Frederick served as the "Union's one-man organizing committee." It is submitted that there is no evidence to this effect.

In many other respects Respondent feels that the Board has not presented to the Court a complete and correct summary of the evidence.

1. The Board's Findings of Fact and Conclusions of Law.

The Charges allege that Respondent discharged Thomas Frederick and Clarence Leeper because of Union activities with respect to the Union.

The International Union, United Automobile Workers of America, A. F. L., filed the Charges [R. 2-3]. The Trial Examiner in his Intermediate Report, concurred in by the Board, found that Respondent discharged Frederick [R. 23], because of his activity in behalf of the Union and because he sought to secure the support of other employees in concerted activities, and found [R. 20] that by discharging Leeper Respondent discouraged concerted activities among its employees, and, as a conclusion of law [R. 26-27] the Trial Examiner held that these charges discriminated in regard to the hiring and tenure of employment of said two persons and hence Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act and that by such discrimination Respondent interfered with, restrained and coerced its employees in the rights guaranteed in Section 7 of the Act and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Respondent in its answer [R. 7], denied the various allegations of the Complaint and alleged that Respondent discharged said Frederick for cause, and alleged that said Leeper quit his job.

2. The Evidence.

Respondent employer is a partnership engaged in the business of manufacturing gas and oil burners and combustion equipment, doing a general machine shop business, and especially manufacturing Jatos, which are jet assist take-off rockets. The manufacturing plant and office of Respondent are located at Whittier, California, and at the time of the hearing Respondent employed about 120 persons [R. 151, 160].

Based upon the Charges, the two factual questions presented are:

(a) Did Respondent discharge Frederick for cause or because he engaged in Union activities?

(b) Did Leeper quit his job or was he discharged by Respondent because he engaged in Union activities?

The evidence introduced at the hearing will be analyzed separately with reference to that evidence (1) concerning Frederick, and that evidence (2) concerning Leeper. The evidence with respect to Frederick will be set forth under two general subdivisions:

(a) Evidence with reference to the circumstances surrounding his discharge; and

(b) Evidence concerning his Union activities.

The evidence with respect to Leeper will be set forth under two general subdivisions:

(a) Evidence with reference to the circumstances surrounding his quitting his job; and

(b) Evidence concerning his Union activities.

3. Thomas Frederick.

Frederick testified [R. 87], that he was first employed by Respondent on August 2, 1946; that he was laid off twice [R. 88]; that after he was laid off he talked to Mr. Martin, co-partner of Respondent, about being rehired [R. 88]; that he started to school in February, 1949 and finished in February, 1951 [R. 100]; that he was married in November, 1950; that while attending school he worked as a part-time employee of Respondent [R. 100]; that he was a part-time worker until he was discharged on December 28, 1950 [R. 89], and that he was averaging about 30 hours a week employment. Martin, co-partner of Respondent, testified [R. 197], that the reason for Frederick's first lay-off was a cutback in their program and the fact that he was not capable of being shifted into another job at that time; that the reason for Frederick's second lay-off was that his work had been getting sloppy; that [R. 198] after the second lay-off Frederick came to see him (Martin) and said he wanted to continue with his schooling; that he (Frederick) knew he had not done too good a job but if he were given another chance, on a part-time basis, to help him to go back to school, he would do a good job for Respondent, and that Martin rehired him to help him out and Frederick went to work on carbons.

(a) Evidence With Reference to the Circumstances Surrounding Frederick's Work and Discharge.

Frederick had been working on axles [R. 170] and turned out fair work. When Respondent's work of making axles slowed down, Frederick was given the work of marking inserts out of a solid carbon bar. Frederick worked on carbons for about two years, during which time he was going to school and working part time [R. 171]. About three weeks before he was discharged and just before the holidays in 1950, Frederick told Respondent's foreman Gilly [R. 171-172, 181] that he would quit if he had to stay on the carbon job. Respondent then put Frederick on work of setting up and breaking down various machines [R. 182]. During these three weeks Frederick also did some work of operating machines [R. 101]. His work did not prove satisfactory. He was discharged for this unsatisfactory work after the holidays, on December 28, 1950.

Frederick testified [R. 92-93] that he was discharged by Edward C. Gilly, foreman of Respondent at the time of his discharge, and that Gilly told him that Fred Nemec had been watching him and said he hadn't been cleaning his machines properly and that he was being laid off. Frederick testified [R. 95] that on the day of his discharge he was helping set up a 4-spindle automatic and that he broke a drill holder on the machine [R. 96]. He further testified [R. 97] that one of the last jobs he had was building jigs to hold the Jato tanks, and that the work which he was doing at the time he was discharged including cleaning machines and that he thought he did clean the same. He also testified [R. 101] that at the time of his discharge he also was operating machines.

Frederick testified that he tried to prod Gilly about the Union at the time he was discharged and also tried to make Gilly tell him he was being discharged because of his Union activities, but that Mr. Gilly did not so state [R. 106-107].

Walter W. Koontz, a witness employed by Respondent for over 15 years as a machinist, testified [R. 151] that he observed Frederick and that after Frederick started going to school, his work slacked down.

Frederick A. Nemec, one of the partners of Respondent, testified [R. 158] that he observed that Frederick was very negligent in the care of his machines and moved very slowly and didn't seem to care whether he worked or not, and that he did not treat Respondent's equipment properly.

Edward C. Gilly testified [R. 169] that he was shop foreman at Respondent's plant and had been employed by Respondent about 10 years; that he knew Frederick and the type of work Frederick did; that Frederick had been working on carbons and that about three weeks before Frederick was discharged [R. 171-172] Frederick told him that if he had to run carbons any more he was going to quit. Gilly explained to him that since he was working only a few hours a day and going to school, it was the only job he could use Frederick conveniently on. Gilly testified that he reported to Mr. Martin, one of the partners of Respondent, concerning Frederick stating that if he had to work on carbons he would quit [R. 172] and that Mr. Martin told him to keep him on for awhile, *until after the holidays anyway*. Gilly testified [R. 172-173] that Frederick did not keep his machines clean and that he spoke to him several times about it,

without any results, and that it was a company policy for employees to keep the machines clean. Gilly further testified [R. 173-174] that when he reported to Mr. Martin that Frederick no longer wished to run carbons and wanted to quit, that he (Gilly) told Martin that he was not satisfied with Frederick's work and that Frederick seemed to have lost all interest in his work and in his job.

Gilly testified [R. 174-175] that a week before Frederick was discharged he was working on the reassembly of a Potter & Johnson automatic machine and used the sledge hammer on the same and that he (Gilly) instructed Frederick not to do so and, despite this instruction, Frederick continued to use the sledge hammer; that he was hammering on a cast iron drum and that, if it had broken, the drum could hardly be replaced.

On the day Frederick was discharged he was working on a tool holder, which was part of an Acme 4-spindled automatic machine. Gilly instructed him how he wished this tool holder fixed and Frederick disregarded his instructions and broke the tool holder [R. 176-177.] Gilly then reported this matter to Mr. Martin, who gave him permission to discharge Frederick [R. 177]. That he (Gilly) then went to the office and had Frederick's time prepared as of quitting time, and gave him his check. Gilly testified [R. 178] that when he discharged Frederick he told him that he did so because he did not keep his machines clean and because of other incidents, such as using a sledge hammer and breaking the tool holder.

Mr. Martin, one of the partners of Respondent, testified [R. 194-195], concerning his conversation with Gilly in which Gilly told him that Frederick would quit if he

had to continue to work on carbons, that Gilly told him that Frederick's work had not been satisfactory and that he should be kept on the carbons; that since replacing Frederick on the carbons, Respondent put another man on the job who turned out three times as much work as Frederick did; that he (Martin) knew that Frederick was not doing a good job, but he was trying to give him a chance. Martin testified [R. 199] that he told Gilly he did not like to lay Frederick off just before Christmas because it looked bad as a company policy. Martin further testified [R. 200-201] that when Gilly reported to him that Frederick had broken a tool holder, which was after Christmas, that he authorized Gilly to discharge Frederick because of Frederick's work. Gilly had told him that Frederick had disregarded his instructions again and that he wanted to lay him off; that he (Martin) gave Gilly authority to discharge Frederick because of reports he had received from Gilly and because of his personal observation of Frederick. On cross-examination Martin again testified [R. 208] that he told Gilly not to lay Frederick off during the holiday season.

Bess L. Nemec, wife of Fred Nemec, testified [R. 212] that she had worked continuously from 1926, when the company started business, to the present time, and that she was the office manager and that [R. 212] she observed Frederick's work in the latter part of 1950 and thought he was "gold-bricking on the job."

(b) Evidence Concerning Frederick's Union Activities.

William Pounds testified [R. 50] that he was the International Representative of the Union in the Los Angeles Area and as part of his duties he conducted organizational activities at Respondent's plant and that

[R. 51] he contacted Frederick in October of 1950, to help in this organizing.

William Smith testified [R. 54] that he was an International Representative of the Union and that [R. 55] he gave Frederick Union authorization cards and that [R. 56] Frederick gave him approximately 55 signed cards on December 28, 1950.

Frederick testified [R. 90] that he talked to employees of Respondent about the Union starting in October, 1950 and that he handed out Union cards to the employees all through the plant and collected the cards from the employees all through the plant and that he did this on December 27 and 28, 1950. Frederick testified [R. 90-91] that Gilly, Foreman of Respondent, saw him pass out cards and that on the night of the 28th he (Frederick) jokingly asked Gilly to sign a card. Frederick testified [R. 97-98] that he did not openly distribute handbills around the plant, but passed out cards in the washroom and distributed some in the washroom and that he passed out Union cards on Company time and on Company property [R. 102] all day long on and off while he was working, and that he talked to the employees at the time he gave out the cards and that he had previously done so on Company time [R. 103]. Frederick testified [R. 105] that he did not give Gilly a Union authorization card to sign, but only jokingly asked him why he did not sign a card. *Frederick testified that neither Martin nor Nemec, partner of Respondent, saw him pass out the cards* [R. 105] *and that he handed out these Union*

authorization cards on the sly and not openly as far as management was concerned [R. 119].

Fred Nemec testified [R. 159] that *he did not know that Frederick was handing out these Union authorization cards to employees.* Gilly testified [R. 178-179] that the dismissal of Frederick had nothing to do with the fact that Frederick was or was not engaged in Union activities and that different employees in the plant were signing other employees' names to the cards and passing them around.

Martin testified [R. 201-202] *that his authorization to Gilly to discharge Frederick had nothing to do with Union activities of Frederick and that he did not know that Frederick was engaged in Union activities until after Frederick was discharged* and that the first time he knew that Frederick was engaged in Union activities after his discharge was when a Mr. Grisham, a Union organizer, called Mr. Nemec in his presence and stated that Frederick was a Union organizer in the plant.

Bess Nemec testified [R. 218-219] that she never saw Frederick handing out any bills and that [R. 220] *she did not know that Frederick was engaged in Union activities* prior to his discharge and did not learn it until after he was discharged.

Raymond Nemec, one of the partners of Respondent, testified [R. 224-225] that he never saw Frederick passing out Union cards or handbills and did not know that he was engaged in Union activities.

4. Clarence Leeper.

Clarence Leeper died June 10, 1951 [R. 124]. He was employed by Respondent as a welder on the night shift [R. 58].

(a) Evidence With Reference to the Circumstances Surrounding Clarence Leeper Quitting His Job.

Herbert J. Snodgrass an employee of Respondent testified [R. 59-60] that in December, 1950 [R. 57] that the welders on the night shift contacted the night superintendent of Respondent, stating that they wanted a night bonus and paid-lunch period. The night superintendent called Fred Nemec [R. 59] who came to the plant [R. 59-60] and a conversation was had in which Leeper did most of the talking and Snodgrass further testified [R. 60] that Leeper asked [R. 69-70] for a shift bonus and pay for the lunch period and that Mr. Nemec stated he would check into it and call different companies and find out what they were paying and at that time *Leeper told Mr. Nemec he would give him 24 hours in which to grant these demands or he, Leeper, was going to quit.* Snodgrass again testified on direct examination [R. 60] that Leeper made the statement he would give Mr. Nemec 24 hours in which to give him an answer and if he hadn't answered within that time *that he was quitting.* Snodgrass testified [R. 71] that Leeper stated that if he did not get the lunch-hour bonus *he would quit* and that Leeper did not say anything [R. 71-72] about coming back and getting his tools, but that he said he would quit and that he was through. That at this meeting with Fred Nemec [R. 71-72] *there was no discussion whatsoever concerning the Union and that Leeper always talked*

away from the Union side and Snodgrass testified [R. 72] in response to a question by the Trial Examiner that he, Snodgrass, had the impression *that Leeper was against the Union.*

Lee Grimm testified [R. 143] that he was employed by Respondent from about December 1, 1950, as a welder and that he was present on the night of December 27, 1950, and that he heard a conversation between Mr. Nemec and Mr. Leeper in which [R. 144] Leeper wanted to get a shift bonus and that Mr. Nemec told him he would have to check and find out what different plants were paying for shift bonuses, and that [R. 145] *Leeper told him he would quit,* and that he, Grimm, did not recall any conversation in which Leeper said he would give Nemec 24 hours to check on the matter and that [R. 146] *Leeper told Fred Nemec he was quitting.*

Grimm's testimony was very positive concerning the fact Leeper was quitting and when again asked [R. 147] if it was his testimony that Leeper told Nemec if he didn't get the shift bonus and the lunch hour-period pay he was quitting, Snodgrass answered "that is absolutely right." Snodgrass further testified [R. 147] that in said conversation not a word was said at all about Union activities. Fred Nemec testified [R. 153] that at this conversation on the night shift of December 27, 1950, *Leeper told him* that if he could not get a night shift bonus and pay for the lunch hour retroactively, *that he, Leeper,* would quit. At this conversation Nemec testified [R. 153] that one of the welders told Leeper he would have to speak for himself.

Nemec testified [R. 154] that on the following day he and his son were going over to Respondent's yard which

was close to Mr. Leeper's home so he took Mr. Leeper's check to him to save Mr. Leeper a trip in to get it and that when he arrived at Mr. Leeper's home he was met by Mrs. Leeper and told her [R. 155-156] that Mr. Leeper had quit and that Mr. Leeper had given Respondent an ultimatum of several things he wanted and that Respondent could not meet Leeper's demands and were therefore letting him quit. He told Mrs. Leeper that he hated to see Leeper go because he was one of the best welders and did not tell her that he was an agitator, but that he had gotten the welding shop into an uproar.

Nemec further testified [R. 131, 159-160] that Leeper went to Respondent's office on December 28, 1950, to discuss whether or not Respondent would hire him back as he had quit, which Respondent refused to do and Mr. Leeper then asked for four-hours reporting pay for the reason that he had taken his time to come in and he, Leeper, thought he was entitled to it. Raymond Nemec, one of the partners of Respondent, testified [R 224] that in the conversation between Leeper and Fred Nemec, Fred Nemec told Leeper that he did not deserve the four-hours pay, but that he would nevertheless give it to him.

Gilly testified [R. 179-180] that Leeper came to the plant on December 28, 1950, and asked him to get his tools for him and that Leeper told him *he was sorry that he had quit* and that he wanted to talk to Mr. Nemec [R. 189].

(b) Evidence Concerning Leeper's Union Activities.

There was absolutely no evidence whatsoever concerning any Union activities of Mr. Leeper. With respect to Union activities in general, Snodgrass testified [R. 73] that Mr. Martin or Mr. Nemec, partners of Respondent, told him that the employees were free to join a Union or not as they saw fit, and that they were not to be intimidated by anybody in any way.

Fred Nemec testified [R. 156] that in the conversation he had in the plant on the evening of December 27, 1950, with Mr. Leeper and other welders that nothing whatsoever had been said about Union demands or Union activities.

Fred Nemec's testimony is completely uncontradicted and even the Trial Examiner had regarded Fred Nemec generally as a creditable witness [R. 120].

Fred Nemec further testified [R. 166-167] that he had no knowledge of any Union activities by Leeper and *that Leeper told him that if a Union came in the plant that he, Leeper, would quit.* Nemec testified that other employees, some of whom he named, had expressed themselves in favor of the Union and that they were not discharged for so doing and continued working for Respondent.

Respondent's Motion to Dismiss.

The Trial Examiner granted Respondent's motion [R. 139] to dismiss that portion of the Complaint set forth in Paragraph 6 thereof [R. 6], upon the ground of insufficient evidence.

The Board in its decision and order [R. 37], in which the Board adopted the findings, conclusions and recommendations of the Trial Examiner, stated, "The Trial Examiner also found that the Respondents had not engaged in an independent violation of Section 8(a)(1) of the Act and consequently dismissed that portion of the Complaint."

Therefore Respondent in its defense to the Complaint only introduced evidence to meet the charges that Frederick and Leeper were discharged because they engaged in union activities.

The Trial Examiner held, and correctly so, that the Chief Counsel had not made out a *prima facie* case that Respondent had interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and hence the Trial Examiner granted the motion to dismiss the charges in Paragraph 6 of the Complaint [R. 137-139].

Having admitted at the trial that insufficient evidence was introduced by the Chief Counsel, how now can the Trial Examiner hold and conclude, and how can the Board adopt such findings and conclusions, that the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1)

of the Act. [Par. 3, Conclusions of Law, Intermediate Report, R. 26.]

The conclusions of law thus reached by the Trial Examiner are not only unsupported by the evidence and the facts as so stated by the Trial Examiner at the hearing, but the Trial Examiner, by dismissing that portion of the Complaint as above set forth at the time of the hearing, agreed that a *prima facie* case had not been made by Chief Counsel. How, then, can the Trial Examiner now conclude as a matter of law that Respondent has violated Section 8(a)(1) of the Act? It would be the most unfair thing in any hearing for a Trial Examiner at the end of the Chief Counsel's case to dismiss a count of a complaint, thus making it unnecessary for the Respondent to meet the allegations thus dismissed and then have the Trial Examiner hold and find that Respondent engaged in unfair labor practices with reference to that portion of the complaint so dismissed.

The Charges filed by the Union [R. 1] specifically state that Respondent discharged Frederick and Leeper upon the grounds that these employees were engaged in union organizational activities, "for the purposes of discouraging the formation of the Union," and the Charges further allege that said activities of Respondent were wilfully and deliberately conducted for the purpose of "discouraging the organization of the Union." The Union not only filed the Charges but is a party to the Complaint filed by the Union, which is based upon the Charges. Of course the Union was already organized in this instance.

Hence, the only charge and allegation, if any, that Respondent was required to meet was that Respondent discharged Frederick and Leeper upon the ground that

these employees were engaged in union organizational activities for the purpose of discouraging the formation of the International Union, United Automobile Workers of America, A. F. L., and Respondent was not charged, nor was there any evidence introduced, that Respondent interfered with, restrained or coerced Frederick or Leeper with respect to their right to self-organization or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Trial Examiner dismissed that portion of the Complaint alleging such a violation of the Act.

In spite of the fact that the Trial Examiner granted Respondent's motion to dismiss, the Trial Examiner in his Intermediate Report still tries to hold that the union activities in which Leeper was alleged to have engaged did not concern the Union which filed the Charges. In this respect the Intermediate Report [R. 20] states as follows:

> "I find that by discharging Leeper on December 28, 1950, the Respondents discouraged concerted activity among their employees and thereby violated Section 8(a)(1) and (3) of the Act."

This is also true in the Intermediate Report concerning Frederick [R. 23].

The Trial Examiner, in his Report [R. 26], states as follows:

> "The unfair labor practices in which Respondents have been found to have engaged manifest an attitude of opposition to the basic purposes of the Act and justify an inference that commission of other unfair labor practices may be anticipated. In order

> to effectuate the guarantees of Section 7 of the Act it will therefore further be recommended that the Respondents cease and desist from in any manner interfering with, restraining, or coercing *their* employees in the exercise of rights guaranteed by the Act." (Emphasis added.)

Taking the last sentence first of the above quoted portion of the Report (concurred in by the Board), we wish to call the Court's attention to the fact that the Trial Examiner states that he will recommend that the Respondent cease and desist from in any manner interfering with, restraining or coercing the rights of its employees. This of course goes completely beyond the scope of the Charges and also of the Complaint, after the granting of the motion of Respondent to dismiss therefrom the allegations contained in Paragraph 6 of the Complaint. The Intermediate Report [R. 12, 13] plainly shows that all that was left in the case after granting of the motion, if anything, were the allegations of unfair labor practice contained in Paragraph 5 of the Complaint [R. 5] with respect to Frederick and Leeper. Hence the Trial Examiner, in saying that Respondent should be punished for coercing *their* employees, brings back into the case allegations and charges that were once dismissed. This of course makes invalid the Conclusion of Law No. 3 [R. 26] of the Intermediate Report and the order of the Board based thereon.

With reference to the first sentence of the above quoted quotation from the Intermediate Report, there simply was no evidence introduced showing that Respondent has manifested an attitude of opposition to the basic purposes of the Act and that the same justified an inference that

commissions of other unfair labor practices may be anticipated. As will be shown below, inferences are not evidence and the Trial Examiner has no right to make an inference.

As a matter of fact, the evidence shows that Respondent did nothing that was anti-union and witnesses called by the Chief Counsel testified that they were free to do as they chose so far as Respondent was concerned.

The Trial Examiner Should Have Made Findings of Fact and Conclusions of Law in Accordance With His Dismissal of Paragraph 6 of the Complaint.

When a defendant's motion to dismiss a complaint for insufficient evidence is granted, the ruling is the equivalent of an involuntary nonsuit and the defendant is entitled to findings in his favor on the merits.

Federal Rules of Civil Procedure, 52(a);

Bach v. Friden Calculating Machine Co. (C. C. A. 9), 148 F. 2d 407;

Gary v. Columbia Pictures, 120 F. 2d 891;

Young v. United States, 111 F. 2d 823;

Warren v. Haines, 126 F. 2d 160.

The Trial Examiner should therefore have made (1) findings in favor of Respondent on all of the charges contained in Paragraph 6, and (2) appropriate conclusions of law that Respondent did not interfere with, restrain or coerce their employees in the exercise of the rights guaranteed by the Act.

Instead of so doing the Trial Examiner, contrary to law and the evidence, has recommended a cease and desist order, directing the doing of things which Respondent never did or threatened to do.[1]

Frederick Was Discharged for Cause. Leeper Quit His Job.

The Findings of Fact of the Trial Examiner, as set forth in his Intermediate Report, are contrary to the evidence adduced at the hearing.

The evidence as to Frederick and as to Leeper shows that neither of them was discharged because of union activities, and the preponderance of evidence as to Frederick shows that he was discharged for cause and as to Leeper that he was not discharged at all, but that he quit.

The Board in its brief [R. 7, 8] tries to state that Respondent claims that Frederick was discharged because of a single cause, to wit, failure to clean machines, and

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[1]The United States Supreme Court in *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, at 799, stated:

> "* * * At that hearing the employer has the right to file an answer and to give testimony. This testimony, together with that given in support of the complaint, must be reduced to writing and filed with the Board. The Board upon that testimony is directed to make findings of fact and dismiss the complaint or enter appropriate orders to prevent in whole or in part the unfair practices which have been charged. Upon the record so made as to testimony and issues, courts are empowered to enforce, modify or set aside the Board's orders, subject to the limitation that the findings of the Board as to facts, if supported by evidence, are conclusive.
>
> "Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties. Such procedure strengthens assurance of fairness by requiring findings on known evidence. * * *."

that this was "an ancient complaint," and in doing so, the Board attempts to bring the facts of the instant case within those of *N. L. R. B. v. San Diego Gas & Electric Co.*, No. 13,525, decided by this Court on June 25, 1953.

Frederick himself testified [R. 97] that during the last part of his employment his work did include cleaning machines, and he testified as follows:

> "Q. Did any of that work include cleaning machines? A. *You do work on an engine lathe at times, that type of work. I was supposed to clean that and I think I did.*"

Respondent thought differently than did Frederick, and offered testimony that Frederick did not keep his machines clean. Hence it was not an "ancient complaint," but was one that existed up to the very time of Frederick's discharge. The evidence also clearly shows, and is not contradicted, that Frederick stated that he would quit if he was not put on other work than carbons; that he slowed down in his work; and that about a week before he was discharged he used a sledge hammer on one of Respondent's machines, contrary to the foreman's orders, and did so after he was specifically told to stop; and that on the day he was discharged he broke a tool holder because he had disobeyed expressed orders in the methods of using the same. Yet the Trial Examiner attempts to draw an inference from the fact that on the day Frederick was discharged he handed out union authorization cards to employees that he was discharged because of his union activity. This was but a coincidence. Did the fact that he broke a tool holder against expressed orders on the day of his discharge have any connection with his union activities? The breaking of the tool holder was a fact

and was the culmination of a long list of unsatisfactory work on the part of Frederick that caused him to be discharged.

The Trial Examiner was forced to admit in his Report [R. 21] that:

> "I believe the record fairly establishes that Frederick was remiss in some of the qualities that an employer would seek in a good workman."

The Trial Examiner, while admitting this, yet tries to argue that Frederick was not discharged for cause.

There is absolutely no evidence that Frederick was discharged because of union activities as alleged in the Charges. Elwood C. Martin, Fred A. Nemec and Robert W. Nemec, co-partners, and Besse Nemec, wife of Fred Nemec, who worked as office manager, all testified that they did not know Frederick was engaged in any union activities until after he was discharged. Their testimony was unimpeached and uncontradicted. Gilly testified that he did not discharge Frederick because of union activities but because he was not doing his work properly. Frederick did not testify that he showed Gilly any cards that he was passing out and it is only a matter of inference to say that Gilly knew it. Frederick did say that he jokingly asked Gilly why he did not sign a union authorization card but the testimony at the hearing was that these cards were passed out in Respondent's plant and some men were signing other men's names to the cards. Frederick admitted that he broke the tool holder and in doing so had gone contrary to Gilly's instructions. That of itself was sufficient to discharge him.

In the Trial Examiner's Intermediate Report [R. 17] he stated that Gilly admitted that Frederick may have offered him a union designation card for signature. This is only the statement by the Trial Examiner tending to show that Gilly had any knowledge of Frederick's union activities, and as shown by the evidence as stated above, many union cards had been passed around in the shop and other men were signing other people's signatures to the same, and hence it probably was a joke and when Frederick stated that he jokingly asked Gilly to sign a card, Gilly probably considered it as a joke because other men were signing other people's names to cards. Frederick testified [R. 105] that he did not give Gilly a card. Gilly testified that he did not discharge Frederick because of union activities and there is not the slightest bit of evidence to show that he did.

The Trial Examiner in his Report [R. 21] states that Gilly's testimony "that he was not aware of Frederick's activity in soliciting employees to sign union authorization cards was, to say the least, disingenuous." The more this report is read the more prejudicial it becomes. Frederick himself testified that he passed the cards out on the sly and did not wish management to know it, and if this is true it can be assumed from Frederick's own testimony that Respondent did not know it. The Trial Examiner [R. 21] says that Respondent pampered Frederick because they did not discharge him when he refused to operate the carbon cutting machine, and from this "pampering" the Trial Examiner draws the odd conclusion that he was discharged for union activities. If you pamper an employee, you normally do not discharge him for union activities. Respondent did not pamper Frederick. Respon-

dent tried to give him every possible chance and particularly did not wish to discharge him just prior to the holidays, which we feel is something for which Respondent should be commended and not condemned.

The Trial Examiner states in his Report [R. 21-22] that the incident about the sledge hammer had a ring of unreality about it and that Gilly's testitmony about it is difficult to evaluate, and the Trial Examiner criticizes Gilly for giving instructions to use a wooden block, the Trial Examiner stating that Gilly asked Frederick "weakly" to use the block. The way the Trial Examiner has written his report cannot help but show that he was prejudiced. There was nothing unreal about the use of the sledge hammer and Frederick did not deny it. The Trial Examiner cannot attempt to say how orders should be given and how machinery should be repaired.

The incident about the sledge hammer was very real. An employer does not have to let his employees beat his machines to pieces and then be accused of unfair labor practice for discharging them.

The Trial Examiner [R. 22] makes an amazing statement, as follows:

> "Whether Frederick actually was at fault in breaking the tool holder I consider immaterial."

There is no question but that Frederick broke the tool holder because he disobeyed Gilly's express order. Frederick admits he broke the tool holder. That of itself is sufficient to discharge an employee. Breaking company tools because of disobedience of orders is a grave thing, and if the Board commences to condone such actions, then the whole labor situation will be placed in a chaotic

situation. The Trial Examiner in his prejudice could not think of anything better to say than that he considered the breaking of the tool holder immaterial. It shows the great weakness in his report. The Trial Examiner tries to say that since Gilly did not go into detail in all these matters when he discharged Frederick, that they did not constitute the cause of discharge. That, of course, is ridiculous. The Trial Examiner [R. 22] concludes that when Frederick was discharged Gilly was hard put to find a plausible reason for it and that the incident about the sledge hammer and broken tool holder played no part in Frederick's discharge. That of course is a false conclusion of the Trial Examiner and is not based upon the evidence at all. The Trial Examiner then states [R. 22] that in these days of full employment and serious worker shortage, employees generally speaking are not lightly discharged. There was no evidence of a serious worker shortage in this area and as a matter of fact there is none.

The Trial Examiner states a very curious thing in his Report [R. 23], as follows:

> "I believe that the Respondents are intelligent enough to accept the fact that employees have a right to form labor organizations and to be represented in matters of collective bargaining. However, this does not mean that they would welcome such a development and *instances happening subsequent to the discharge of Frederick established that the Respondents earnestly desired that their employees not select a bargaining representative.*" (Emphasis ours.)

There was no evidence introduced whatsoever of any instances that happened after Frederick's discharge to

establish that the Respondent earnestly desired that their employees woud not elect a bargaining representative. In his Intermediate Report, the Trial Examiner states [R. 23] as follows:

> "Certain employees were told that the Company could not pay the union scale of wages and compete successfully in the marekt; others, that their earnings depended upon production, that the more they produced, the better their opportunity to secure wage increases. That the Respondents would view with disfavor anyone who actively, and perhaps with the appearance of success, was attempting to organize their employees, is completely believable."

As stated above, when the Chief Counsel rested his case, Respondent moved for a dismissal of the Complaint and the Trial Examiner, as shown in his report, dismissed all of the Complaint except that pertaining to Frederick and Clarence Leeper. This means that the allegations of Paragraph 6 of the Complaint above set forth were not proven by the Chief Counsel in his case and the same were dropped, and that Respondent did not have to put on proof to disprove such allegations. It seems that the Trial Examiner is hitting below the belt in his report because, having dismissed the Complaint with respect to Paragraph 6 and thereby lulling Respondent into a sense of security so that Respondent did not have to put on any evidence to disprove the allegations of said Paragraph 6, now the Trial Examiner uses some weak evidence put on by the Chief Counsel which he found insufficient at the trial to support Paragraph 6 of the Complaint, to try to show in his Intermediate Report that Respondent was anti-union.

There is nothing wrong for an employer to tell his employees that he cannot pay the union scale and that if they produce more they will be paid more. The conclusion that the Trial Examiner reached as set forth above, to the effect that Respondent would view with disfavor anyone who actively, and perhaps with the appearance of success, was attempting to organize its employees, is completely unsupported by the evidence and is entirely without the issues of the case, and highly prejudicial. It does show the state of mind of the Trial Examiner to be unfair and unsound and that his conclusions are entirely unreliable.

The Trial Examiner in his Report [R. 23] states that he was convinced that the Respondent was aware of union activities on the part of Frederick. He makes this statement despite the fact that there is no evidence to support it. Respondent does not claim that it did not know that the Union was attempting to organize its employees but the testimony on behalf of Respondent was not contradicted and clearly shows that Respondent did not know, as stated above, that Frederick was engaged in union activities until after his discharge.

The Board in its brief [R. 3] did not state fully what Frederick stated concerning being taken off of the carbon job. The brief merely states that Frederick protested being assigned to the work, whereas the evidence, as above set forth, shows that Frederick stated he would quit if not taken off this job. And the Board tries to give the impression that Frederick was taken off the job because Respondent's requirements increased so that a full-time employee was necessary for the work. As a matter of fact, Gilly wanted to lay Frederick off when

he said he would quit if not taken off the carbon work, because there was no other work Frederick could do, but Mr. Martin did not want to do so before Christmas. Respondent was hard pressed to find a job Frederick could do and put him at work on setting up machines and maintenance work, at which work Frederick did not prove satisfactory. The fact that he did not do this type of work properly occurred immediately at and prior to his discharge and was not related back many years, as the Board would lead one to believe. The Board (Br. p. 13), states that Respondent did not relish the prospect of having to deal with its employees through a collective bargaining agent, but the Board does not cite any evidence to this effect.

A review of the above evidence clearly shows that Frederick was discharged for cause and that he never requested to be reinstated. The Complaint, Paragraph 5 [R. 5] states that Respondent discharged Frederick on or about December 27, 1950, and at all times since said date has refused and failed to reemploy him. You cannot refuse to do an act until you have been so requested, and no evidence was introduced by the Chief Counsel showing or tending to show that Frederick had asked to be reinstated or that Respondent had refused to reinstate him.

Section 10(c) of the Act provides that no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Hence, the findings and conclusions of the Trial Examiner, concurred in by the Board, with reference to the back pay, are improper because Frederick was discharged

for cause and the Chief Counsel did not prove by a preponderance of evidence that Frederick was discharged because of union activities. In fact, the Chief Counsel tried to say that Frederick was discharged because of concerted activities, rather than union activities, yet the Trial Examiner tries to show that Frederick was discharged because he was handing out union authorization cards.

It is a common practice, and there are many decisions about it, that when an employer discharges an employee for cause and if such employee at such time should happen to be engaged in union activities, the first thing the union does is to run to the Board and shout discrimination.

Even under the Act before it was amended it was held time and again that an employer had the perfect right to discharge an employee for cause.[2]

The evidence produced by Respondent clearly shows that Frederick had not been properly performing his duties. He had become slow and slovenly; he had disobeyed orders; he had broken company property and tools. These are sufficient facts for discharge for cause. Assume for the sake of argument that both cause for

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[2]In the case of *Associated Press v. N. L. R. B.,* 301 U. S. 103, the court said:

> "The Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible."

discharge and participation in union activities on the part of Frederick existed, can the Trial Examiner merely say which motivated the minds of Respondent? Can he say that if cause for discharge had not existed that Respondent would have discharged Frederick anyway, or could he say Frederick had been discharged for cause even if the Trial Examiner felt that no union activities existed? If both cause for discharge and union activities exist at the same time, an employer is not required by the Act to continue to hire an employee because he may fear that charges will be filed against him. Here again comes the preponderance of evidence test which the Chief Counsel simply failed to meet.

In the case of *National Labor Relations Board v. Edinburg Citrus Assoc.,* 147 F. 2d 353, two employees were discharged on the grounds of disturbing other employees. These two employees were union organizers and the Board held that the discharge was an unfair labor practice because of discrimination in regard to hire or tenure, etc. This case was under the Act before the amendment. However, the court held in reversing the Board, as follows:

> "Other evidence of interference with organization seems to us insufficient. Most of it relates to objections to union discussions in work hours. It is well settled that an employer may so object. An outburst of impatience by Hyde on one occasion he promptly apologized for. We do not think there is substantial evidence of employer interference with self-organization. . . ."

Of course, under Section 8(c) of the Act as amended the employer now can express any views, arguments or

opinions and the same shall not constitute or be evidence of an unfair labor practice under any provisions of the Act if such expression contains no threat of reprisal or force or promise of benefit.

There is no evidence that Respondent with reference to Frederick or Leeper made any threat or reprisal or force or used any promise of benefit.

The Trial Examiner evidently tried to make his authority a pretext for interference with the right to discharge. When that right is exercised for other reasons than such intimidation and coercion, this neither he nor the Board is entitled to do.[3]

Frederick in his testimony tried to surmise that he was discharged because of his union activities although he admitted that these activities were carried on on the sly.[4]

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[3]*N. L. R. B. v. Jones & Laughlin S. Corp.*, 301 U. S. 1 (1936), 81 L. Ed. 893, at page 916.

Held:

"The Act does not compel agreements between employers an employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation and on the other hand, *the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons* than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." (Emphasis added.)

[4]*Burlington Dyeing & Finishing Co. v. N. L. R. B.*, 104 F. 2d 736 (4th Cir., 1939), at pp. 738-739.

The court held:

"We next come to consider the discharge of the employees, W. J. Johnson, and H. C. Brooks. With regard to Johnson,

We could continue to cite case after case to substantiate Respondent's position.

With reference to Clarence Leeper, the testimony is undisputed that Leeper stated that if he did not receive

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a careful search of the record discloses no evidence that his discharge was brought about because of his union membership or union activities other than the surmise by Johnson himself. His was the only evidence on that point and that was only an opinion based upon no fact and unsupported by the testimony of any other witness. The Trial Examiner who heard the witnesses and saw their demeanor on the witness stand found to this effect. On the other hand, there was ample evidence, corroborated and uncontradicted, that there was good cause for Johnson's discharge. Johnson had been careless in his work and had been reprimanded because of it and immediately prior to his discharge he had damaged a large amount of cloth. He was admittedly guilty of infractions of the rules of the company.

"While it is true that courts cannot make their own appraisal of the evidence and that findings of the Board as to facts, if supported by evidence, shall be conclusive, yet if the findings of the Board are not supported by substantial evidence they will be reversed. *Appalachian Electric Power Co. v. National Labor Relations Board,* 4 Cir., 93 F. 2d 985; *National Labor Relations Board v. Columbian Enamelling & Stamping Co., Inc.,* 59 S. Ct. 501, 83 L. Ed. .....

"Here the Board, without any basis of fact that can be found in the evidence offered, reversed the findings of the Examiner as to Johnson and ordered his reinstatement and that he be paid in part. The reasons given by the Board for its conclusion are the admitted facts that the officers of the company were opposed to labor unions and that Johnson was a member of such a union. A conversation between Johnson and a foreman as to his reading a C. I. O. newspaper, also relied upon by the Board, is entirely too unsubstantial as a basis for a finding that he was discharged because of union membership. We are of the opinion that these facts alone are not sufficient to prove the petitioner company guilty of an unfair labor practice. The Board found it significant that no documentary evidence had been produced by the petitioner at the hearing showing that goods were damaged by Johnson, yet the Board refused the request of the petitioner to offer such additional evidence later on the ground that the hearing had been closed and that the petitioner had had an opportunity to produce such evidence without doing so. We are of the opinion that the attitude of the Board on this point was

certain night shift differential and pay for time not worked during his lunch period that he would quit. Is there anything in the law that says an employer must meet every wage demand and whim of an employee? An

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technical but, in view of our conclusion as to the discharge of Johnson, it is not necessary to decide whether the petitioner should have been allowed to produce additional evidence. In discharging Johnson the petitioner did not engage in any unfair labor practice."

Wilson & Co. v. N. L. R. B., 103 F. 2d 243 (C. C. A. 8th Cir., 4/12/39 Reh. den.).

Wilson & Co. operated a plant in which one of the departments was hog killing and cutting. The removal of the loin was called "loin pulling" which required skill so that the lean meat was not exposed. If exposed it was called "scoring." Wenzel was an expert loin puller and had been employed by the Company 18 years. He was a charter member of the Union involved and was president of the local.

On February 18, 1935, one of the customers of the Company complained of loin scoring and these complaints persisted. Jackson was the foreman over Wenzel and another employee, Torgerson, who were both loin pullers.

Jackson was anxious to retain his job and he discharged Wenzel and Torgerson.

The court in its opinion stated (p. 245):

"The position of the company as to the discharge was that he was discharged for bad workmanship resulting in losses to the company. The individual directly responsible for and who actually discharged Wenzel was Grover Jackson, immediate foreman over Wenzel. The issue here is whether there is substantial evidence that Wenzel was discharged because of his union activities. The direction of the evidence is such that this issue really takes the practical aspect of whether there is substantial evidence that he was not discharged for poor workmanship.

* * * * * * *

"He took the matter up repeatedly with Wenzel and Torgerson, the loin pullers. Their work would improve temporarily and then slump back. Several of his higher officers made several checks of this loin pulling by inspecting the loins after they had passed from the pullers to the floor below. They found numerous instances of scoring. In June or July, Jackson made up his mind that the above two loin pullers, while capable of doing better work, would not do so. His repeated admonitions had resulted only in temporary improvements. To save his own job he determined to discharge the

employer still has the right to say what wages he will pay, and if an employee does not wish to work for the same, he can quit. We fortunately in the United States

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two loin pullers at that time. The plant manager and plant superintendent prevailed upon him not to do so but to make further efforts to rectify the situation. This he did, but the condition, he thought, was not remedied and, on August 17, 1935, he discharged both men. He did this without the knowledge of any of his superiors. The next day a committee of the Employee's Representation Plan urged the reinstatement of the two men upon the manager and the superintendent. These officials were agreeable to such reinstatement if Jackson would consent, since he was the one immediately involved and responsible for the work and the discipline of the men under him. A meeting was held that afternoon at which the manager, the superintendent, Jackson, Wenzel, and, possibly, members of the above committee were present. At that meeting the matter of re-employment of Wenzel and Torgerson was put up to Jackson, who refused to consent." (P. 249.)

The court held (p. 250):

"This trouble began in February, 1935. It reached its first crisis in June, when Jackson had determined to discharge the two loin pullers. If the company officials had desired to be rid of Wenzel because of his union activities it is strange that Jackson's superiors would have then prevailed upon him to retain Wenzel and Torgerson and give them another chance."

* * * * * * *

"It is very clear that the discharge of these men came from Jackson and Jackson alone. There is not one word of evidence of any animosity by Jackson toward Wenzel, personally, or toward the union, of which he was an officer, or that Jackson had any interest at all except in seeing that the work was done to the satisfaction of his superiors so that he (Jackson) could save his own job. It is significant, also, that both of these experienced loin pullers were discharged in the face of the fact that Jackson and everyone else connected with the matter understood that the company would suffer loss for several weeks during the training of men to take their places. We cannot find any evidence whatsoever, much less any substantial evidence, that the discharge of Wenzel was not solely for the reason that Jackson thought he was not doing the work as it should be done and that he would not do it as it should be done—in short, for good cause. Our conclusion is that the determination of the Board as to the discharge of Wenzel is not sustained."

still have a free labor market. If a man does not like his job, he can quit. If he does not do his job properly, he can be discharged. What would the Trial Examiner expect Respondent to do in the case of Leeper? Fred Nemec testified that he told Leeper he would look into the matter, but that did not satisfy Leeper and so he delivered an ultimatum. Respondent refused to concede to his demands and so he quit. He later asked to be rehired but there is no law that says that Respondent had to rehire him. There is absolutely no evidence that he was discharged for any union activities. If employees tell the employer that if they do not get a wage increase that they will walk out, and if employer refuses to grant such a wage increase, it is not an unfair labor practice. Such things happen every day.

The Trial Examiner in his report [R. 18] states that under the evidence it cannot be doubted that Leeper was discharged. The evidence was clear that Leeper quit and said he was quitting. There is no evidence that Respondent discharged him at all. Respondent, believing that he had quit, made out his pay check and attempted to deliver it to him at his home so that he would not have to be inconvenienced by going back to the plant for it.

The Trial Examiner states [R. 19-20] as follows:

> "Now Nemec may certainly be pardoned for being disturbed by the conduct of Leeper and may well have wished that the welders would seek to deal with him individually rather than as a group but

> when he refused longer to employ Leeper because of his leadership in the action he was violating a right secured to Leeper by the Act."

This is a very odd statement for the Trial Examiner to make. He assumes that Nemec should be pardoned. This, of course, is perfectly ridiculous. There is nothing in the evidence to even tend to show that Nemec wanted to deal with the welders individually, but, on the contrary, the evidence shows that Respondent was always willing to discuss any matters with its employees. Leeper quit and the Trial Examiner cannot say fairly that Respondent refused longer to employ Leeper because of his leadership in the action.

The undisputed evidence is that Leeper was opposed to the Union [R. 72, 167]. It is ridiculous to say that an employer would discharge and refuse to rehire an anti-union employee for union organizational activties.

The Board in its brief (p. 18) even tries to change the testimony, which was that Leeper said he would quit, the Board stating that, "in the context, obviously meant 'strike'." There is absolutely no evidence that Leeper said that if his demands were not met he would strike.

The Rule of Preponderance of Evidence.

Under the original National Labor Relations Act, review of the Board's Findings of Fact was restricted to a consideration of whether or not there was substantial evidence in support of the particular findings. The original Act itself required in Sections 10(e) and (f) that the findings

be supported only by "evidence," but the Supreme Court held that "evidence" as used in the original Act meant "substantial evidence." In *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197, the Court stated:

> ". . . Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ."

The 1947 amendments to the Act expanded the scope of judicial review, especially review of the evidence. The new amendments establish in effect a "preponderance of evidence" test with respect to conclusions of law by the Board.

Hence, if under the original Act the court did require substantial evidence, now due to the Act of Congress,[5]

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[5]The Conference Committee Report of Congress with reference to the 1947 amendments, correlates the changes regarding evidence made in Sections 10(b), (c), (e), and (f), as follows:

> "Under the language of Section 10(e) of the present Act, findings of the Board upon court review of Board orders are conclusive 'if supported by evidence.' By reason of this language the courts have, as one has put it, in effect 'abdicated' to the Board (citing cases). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (citing cases), or when they rested only on *inferences* that were not in turn supported by the facts in the record (citing cases).
>
> *"As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of Board in its field can no longer be a factor in the Board's decisions.* While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their

the courts must require that there be a preponderance of evidence.

Section 10(c) as originally enacted, provided as follows:

> "If upon *all* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, . . ."

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practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.

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"The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* (316 U. S. 105 (5 Labor Cases, Par. 51,140)) and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, *supra,* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into Section 10(e) of the amended act."—Conference Report, House Report 510, 80th Cong., pp. 55-56. (Emphasis added.)

* * * * * * *

The Conference Report with respect to the preponderance of evidence test, states as follows:

> *"Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet that test otherwise.* Again the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. *Immeasurably increased respect for decisions of the Board should result from this provision."*—Conference Report, House Report 510, 80th Cong., pp. 53-54.

As amended in 1947, Section 10(c) provides that orders shall issue:

> "If upon the *preponderance of the testimony* taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice . . ." (Emphasis added.)

In the case of *N. L. R. B. v. Sandy Hill Iron & Brass Works* (2d Cir.), 13 Labor Cases, 64098, the Court held that the provisions in the 1947 amended Act requiring that the existence of unfair labor practices must be established by a preponderance of the evidence, precludes the Board from basing findings solely on its "expert" judgment.

This Court held, in *N. L. R. B. v. San Diego Gas & Electric Co., supra,* that under the requirements of the Labor-Management Act of 1947 "appellate courts are required to take a 'new look' in determining whether *substantial evidence exists to support a finding. It is no longer sufficient if some substantial evidence exists.* Such evidence must withstand scrutiny with an eye focused on its relation to all the evidence in the record."[6]

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[6]The essence of Mr. Justice Frankfurter's opinion in *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474, and to this extent concurred in by all the other Justices, is that the Administrative Procedure Act and the Taft-Hartley Act direct that reviewing courts must now assume more responsibility for the reasonableness and fairness of decisions of the National Labor Relations Board than some courts have shown in the past. In particular, it was held that, in determining whether an order of the Board is supported by substantial evidence, the court should take into account whatever in the record fairly detracts from the weight of the evidence, and that the court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Employers are still free to discharge, lay off, demote or refuse to reinstate an employee when they are not motivated by a desire to inhibit free unionization. Before it can be held that a violation has occurred, a preponderance of the evidence must show that the discharge or other disciplinary measure was motivated by anti-union consideration. If this burden of proof is not sustained, the Board may not hold that a violation of the Act has occurred. The employer is free to discharge or otherwise discipline his employees, it has been said, for a good cause, a bad cause, or no cause at all, so long as he is not primarily motivated by anti-union considerations.

Prior to the amendment of the Act in 1947, the question of motivation has been indirectly approached by the Board and, among the facts and circumstances which the Board has considered indicative of the presence of discriminating motivation, are the following: (1) Violent anti-union background of the employer, evidenced by past history of interference, restraint and coercion; (2) threat of disciplinary action or shutdowns if unionization develops; (3) surveillance of unionizing activities prior to discharge; (4) expressed satisfaction with the work of employees later discharged; and (5) absence of any other good cause for the discharge and preference of one of the foregoing factors.

Under the preponderance of evidence test, the courts will certainly hold that the Board can no longer make assumptions as above, but must have absolute direct evidence upon which to establish such facts.

However, in the instant case there is no evidence at all showing any anti-union background of Respondent,

although the Trial Examiner tries to make an unwarranted inference to that effect. [Intermediate Report, R. 26.]

The Trial Examiner evidently tried to use his "expert" judgment, forgetting that such a thing was no longer possible. A reading of the evidence plainly shows that the Chief Counsel did not prove by a preponderance of the evidence either the allegations of the complaint or the charges as filed. In the Intermediate Report, for example, the Trial Examiner states [R. 18]: "I think that it may not be doubted under the evidence that Leeper was discharged. True enough, he had issued what might be termed an ultimatum to the Respondents and had stated that he would quit if they did not meet his conditions."

The finding of the Trial Examiner that Leeper was discharged is not supported by a scintilla of evidence. The Trial Examiner, as above quoted, admits that Leeper stated that he would quit, and yet he holds that Leeper was discharged.

Board's Decision and Order.

The Court's attention is called to the Findings of Fact of the Trial Examiner, concurred in by the Board [R. 25] in which the Examiner recommends that Respondent offer Frederick full reinstatement and make him whole for any loss of pay by payment to him of a sum of money equal to what he normally would have earned as wages from the date of his discharge, December 28, 1950, to the date of Respondent's offer of reinstatement, less Frederick's earnings during that period. This recommendation is not quite clear. Frederick worked as a part-time employee of Respondent and averaged about 30 hours per week (*supra*). At the time of his discharge it was

during school holidays and he was working full time. His normal wages would be on the basis of 30 hours per week and not on the basis of full time, and it is Respondent's understanding that in calculating Frederick's normal earnings, the Trial Examiner meant the amount he would receive on the basis of his part-time work week.

Conclusions of Law must be based upon proper Findings of Fact and also upon the charges as filed. Inasmuch as the Trial Examiner's Findings of Fact, or at least what he states the facts were in his Intermediate Report, are not supported by the evidence, and are contrary thereto, it must follow that the Trial Examiner's Conclusions of Law are erroneous. A reading also of the Conclusions of Law and recommendations plainly shows that the same are based upon charges which even the Trial Examiner dismissed during the hearing.

Looking at the recommendations [Intermediate Report, R. 27] in view of the charges as filed and those dismissed by the Trial Examiner at the hearing, what basis is there for the recommendations that Respondent cease and desist from discouraging activities among its employees with respect to the union, etc., and in any manner interfering with the exercise of the right of its employees to self-organization, etc.?

Assuming the Complaint had not been at variance with the charges, the only two points in the case that were left after the granting of Respondent's motion to dismiss as above set forth were simply the questions of whether or not Frederick was discharged for cause or for engaging in union activities, and whether or not Leeper quit. What has this to do with the activities of other employees of Respondent?

Why should Respondent be compelled to post any notice as recommended on page 8 of the Intermediate Report? Why should Respondent be required to pay back-pay to Leeper when he quit, or to pay back-pay to Frederick when he was discharged for cause?

Since the Board's Decision and Order are based solely on the Trial Examiner's Conclusions of Law and Recommendations, it follows that since the Trial Examiner was in error as aforesaid, the Board's Decision and Order are also erroneous.

Conclusion.

For the reasons stated, the Court should set aside the Order of the Board, dismiss the Complaint, and refuse to grant an order to enforce the Board's Order.

Dated this 24th day of July, 1953, at Los Angeles, California.

Respectfully submitted,

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J. E. Simpson,

By J. E. Simpson,

Attorneys for Respondent.

APPENDIX.

In the case of *Joanna Cotton Mills Co.* (*supra*), the Court stated:

"The case originated on a charge filed with the Board by an A. F. of L. Union in 1947 alleging that the company had engaged in various antiunion activities and had discharged Blakely because of his membership in and activities on behalf of the union. An amended charge was filed on February 13, 1948, adding to the original charge an allegation that the company had discharged Blakely because he had engaged with other employees 'in concerted activities for the purpose of collective bargaining and for other mutual aid and protection;' but a copy of this amended charge was not mailed to the company until February 26, 1948, more than six months after the Labor-Management Relations Act of 1947, 61 Stat. 146, 29 USCA 160, had become effective. The Board found that the company had not been guilty of the antiunion activities alleged and had not discharged Blakely because of union membership or activties but had discharged him because of engaging in other concerted activities which were held to be embraced within the amended charge. Two members of the Board, including the chairman, dissented from the holding on the amended charge. The company contends: (1) that the finding that Blakely was discharged for engaging in concerted activities is not sustained by substantial evidence, (2) that what is relied upon to support the charge does not fall within the meaning of concerted activities as those words

are used in the statute; and (3) that the amended charge is barred by limitations because not served upon the company within six months after the passage of the Labor-Management Relations Act."

The Court held (p. 754):

"And we think, also, that the charge is barred by limitations. Section 10(b) of the Labor Management Relations Act, 29 U. S C. A. §160(b), specifically provides that 'no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.' We agree that the six months, as applied to the charge here, runs from the date when the statute became effective. See The Fred R. Smartly, Jr., 4 Cir., 108 F. 2d 603, 607. *The trouble, however, is that no charge relating to discharge for engaging in concerted activities, as distinguished from union activities, was served upon the company until more than six months had elapsed after the act had become effective.*

"The answer of the Board is that the charge served more than six months after the effective date of the act was an amended charge and that the original charge was filed and served in time. The trouble with this is that the original charge was not one which could have been sustained by proof of discharge on account of Blakely's activities in connection with the petition. It was one relating solely to antiunion activities and the discharge of Blakely on account of union membership and activities in behalf of the union, a charge of which the Board found that the company was not guilty. *The amended charge,*

which was expressly filed as a substitute, *alleged for the first time that the discharge was because Blakely had engaged in 'concerted activities' other than in connection with his union membership, and thus brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge.*

"The Board argues that it was the discharge of Blakely that was charged as an unfair labor practice in both charges; but *the mere discharge of an employee is not an unfair labor practice.* To discharge him because of union membership or activity is, of course, an unfair labor practice; to discharge him because of originating and presenting a petition for the discharge of a foreman, if an unfair labor practice, is one of an entirely different character. The case seems clearly one for the application of the rule recently announced by the Supreme Court that 'a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.' *United States v. Andrews,* 302 U. S. 517, 524, 58 S. Ct. 315, 82 L. Ed. 398; *United States v. Garbutt Oil Co.,* 302 U. S. 528, 58 S. Ct. 320, 82 L. Ed. 405. Not until more than six months after the effective date of the Labor-Management Relations Act was any charge served upon the company upon which the finding of guilt made by the Board could have been based; *and it was then too late for the charge to be made.*

"For the reasons stated, the order of the Board will be set aside.

"Reversed."

The following cases are cited by the Board in its brief with reference to Respondent's assertion that neither the Board nor this Court has jurisdiction of this matter for the reason that the Complaint was issued more than six months after the alleged unfair labor practices allegedly occurred. The cases thus cited are distinguishable and Respondent submits do not support the Board's position.

Cusano v. N. L. R. B., 190 F. 2d 898 (C. A. 3).

In this case the amended charge, which was filed more than six months after the alleged unfair labor practice, did not abandon the original charge but only added to it, and the court held that the allegation in the amended charge was, at most, a slight change in legal theory.

In the case of *N. L. R. B. v. Kingston Cake Company,* 191 F. 2d 563 (C. A. 3), cited by the Board in its brief on page 23, the charge was filed by the employee and the court said that the charge puts company on notice that employee challenges its basis for dismissing him and that there was a legally sufficient relationship between the subject matter of the charge and the allegations of the complaint. The six months' period of limitations was not involved in this case.

In the instant case the Charge was filed by the Union against the Respondent, and not by the employee.

The Board in its brief (p. 26), cites the case of *N. L. R. B. v. Bradley Washfountain Co.,* 192 F. 2d 144, with respect to the doctrine of "relating back." The question of the six months' limitation is not involved in this case and it would appear that the complaint was filed within six months after the occurrence of the alleged

unfair labor practices. The court held (p. 149) as follows:

"Accordingly, we are of the opinion that the Board improperly grounded its conclusion as to the increases made in June and October and as to the concession concerning holidays made in July upon a charge not contained in the complaint as contended by respondent."

The court held that it was not significant that the complaint was broader than the original charge but the court did not state that the complaint contained a new or additional charge, as in the instant case.

The Board in its brief (p. 27) cites the decision of this Court in the case of *Katz et al. v. N. L. R. B.*, 196 F. 2d 411 (C. A. 9), in support of its contentions. In that case all that this Court held was that the charge was sufficient to support the allegations of the complaint and that it was not too general.

With respect to the six months' period of limitation, the Court stated (p. 415):

"While, as we shall shortly show, the mere execution of the agreement on December 17, 1948, constituted an unfair labor practice, there is no doubt but that the continuous enforcement of the agreement thereafter within the six months period prior to the filing of the charge, was an unfair labor practice, and with respect to this continued and continuous enforcement of the illegal union shop agreement, the prosecution of the proceeding was not barred by limitations."

In the case of *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, decided in 1939, cited in the Board's brief (p. 25), the Court did not hold contrary to the conten-

tions of the Respondent herein. That case was decided prior to the six months' limitation as now found in the amended Act. In that case the petitioner contended that the charge is a jurisdictional prerequisite to the complaint and subsequent proceedings and that they are restricted to the specific unfair labor practices alleged in the charge. The Court held that the complaint only elaborated the charge with particularity and stated that the violations alleged in the complaint were but a prolongation of the attempt to form a company union and *"all are of the same class of violations as those set up in the charges and were continuations of the same objects."* (Emphasis added.) And the Court then held that it was unnecessary for it to consider how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it.

The Board in its brief (p. 27), cites the case of *Kansas Mill Co. v. N. L. R. B.,* 185 F. 2d 413 (C. A. 10), as additional authority for the doctrine of "relating back." In this case the court did not hold that the amended charges stated a new and different charge of unfair labor practice. The court stated:

"The second amended charge merely alleged in particular acts constituting unfair labor practices under Section 7 of the Act. There is nothing inconsistent in the first or second amended charge with the general allegations of the original charge. They are somewhat in the nature of a bill of particulars, making more definite the general allegations of the original charge, and thus relate back to the original charge."

N. L. R. B. v. Gaynor News Co., 197 F. 2d 719 (certiorari granted, 345 U. S. 902).

Board in its brief (p. 27), cites this case as authority to authorize inclusion within the complaint of amended charges filed after the six months' limitation period, upon the doctrine of "relating back." It will be noted, however, in this case that the amended complaint did not add any new or different charges of unfair labor practice. The court stated, at page 721:

"We feel that the enlarged complaint can be justified here on the 'relating back' theory in so far as the additional victims of the discriminatory treatment are concerned. Here the violation and the facts constituting it remained the same as in the original charge; only the number of those discriminated against was altered. This addition certainly could not prejudice the employer's preparation of his case, or mislead him as to what exactly he was being charged with. (Citing cases.) The same is true of the additional allegation in the final complaint that action previously categorized as a violation of §§8(a)(1) and (3) constituted also a violation of §8(a)(2). This was a change in legal theory only, and not in the nature of the offense charged. (Citing cases.) As to the charge of illegality concerning the 1948 contract, we agree that, so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing, the six months' limitation period of §10(b) had not even begun to operate. (Citing cases.) The complaint was, then, in all respects valid."

In the case of *N. L. R. B. v. Dinion Coil Co.*, 201 F. 2d 484 (C. A. 2), cited by the Board in its brief (p. 26),

the court permitted the complaint to be amended to add the names of two more employees whose discharge occurred about seven months before the filing of the amendment. It will be noted in this case that the complaint was not amended to add a new and different charge of unfair labor practice.

In the case of *Stokely Foods v. N. L. R. B.*, 193 F. 2d 736, cited by the Board in its brief (in Footnote 22, p. 24), it appears from the decision that the charges were filed within six months after the occurrence thereof and that the complaint did not add a new or different charge as in the instant case, but alleged with more particularity the violations set forth in the charges.

In the case of *N. L. R. B. v. Cathey Lumber Co.*, 185 F. 2d 1021 (Board's Br. pp. 24, 26), the Circuit Court, in 189 F. 2d 428, granted a rehearing setting aside its prior judgment and the order of the court and dismissed the complaint, because of the failure of the union to comply with Section 9(h) of the Act.

In the case of *N. L. R. B. v. Kobritz,* 193 F. 2d 8, cited in Board's brief (p. 26), it appears from the decision that an original and three amended charges were filed within the six months' period but that the complaint contained no specific allegations with reference to the second charge and the complaint was amended to include the second charge. The court held that the filing of the third amended charge did not constitute a withdrawal of the second amended charge and therefore did not preclude the Board from predicating a complaint upon the second amended charge.

Said case is not in point with the instant case.